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Supreme Court, U.S.
FILED

96 985 DEC 16 1996

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ANTONIO CESAR CHAMORRO-TORRES,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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31 pp

Question for Review

Petitioner respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals entered on September 17, 1996 granting Respondent's Motion to Dismiss the Petition for Review for Lack of Jurisdiction, thereby giving retroactive application under pertinent provisions of Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996, which application is contrary to the intent of Congress, and violates the due process clause and Article Three of the Constitution of the United States.

CITATION TO ORDER

The Order subject to this Petition was entered September 17, 1996 in the United States Court of Appeals for the Fifth Circuit, Antonio Cesar Chamorro-Torres, Petitioner v. Immigration and Naturalization Service, Respondent, Case No. 95-60703, a copy of which appears in the Appendix hereto.

JURISDICTION

The Order of the Court of Appeals for the Fifth Circuit was made and entered on September 17, 1996, and a copy thereof is appended to this petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and Sec. 2350(a).

STATUTES INVOLVED

The relevant statutory provisions are as follows and appear in the Appendix attached hereto:

28 U.S.C. Sec. 1254(1); 28 U.S.C. Sec. 2350(a); 8 U.S.C. Sec. 1251(a)(2)(B)(i); 8 U.S.C. Sec. 1182(c); 8 U.S.C. Sec. 1105a(a); P.L. No. 104-132, 110 Stat. 1214, Section 440(a); U.S. Constitution, Article III; U.S. Constitution, Amendment V.

STATEMENT

Petitioner is a native and citizen of Chile who first entered the United States on or about August 14, 1977 as an immigrant. On November 2, 1990, he was convicted for the offense of racketeering and money laundering. The Immigration and Naturalization Service ("INS") issued an Order to Show Cause on August 19, 1993 charging Petitioner with being deportable under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. Sec. 1251(a)(2)(B)(i). In October of 1994, an Immigration Judge found the Petitioner to be deportable and granted his request for a waiver of deportation under Section 212(c) of the Act, 8 U.S.C. Sec. 1182(c). The INS appealed and the Board of Immigration Appeals ("the Board"), on October 11, 1995 reversed the grant of the waiver of deportability, finding that the Petitioner had abandoned his lawful permanent resident status and, was, therefore, ineligible for a 212(c) waiver. On November 30, 1995, the United States Court of Appeals for the Fifth Circuit granted petitioner's Motion for Stay of Deportation pending review, same having been unopposed.

On April 24, 1996, while petitioner's Petition remained pending before the United States Court of Appeals for the Fifth Circuit, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, P.L. No. 104-132, 110 Stat. 1214 ("AEDPA"), Section 440(a) of which provided:

Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in Section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by Section 241(a)(2)(A)(ii) for which both predicate offenses are covered by Section 241(a)(2)(A)(i), shall not be subject to review by any Court.

Subsequently, the INS filed its Motion to Dismiss Petition for Review for Lack of Jurisdiction, citing the provisions of Section 440(a), and the Fifth Circuit's opinion in *Mendez-Rosas v. INS*, 87 F.3d 672 (5th Cir. 1996). Petitioner responded and by motion requested that the Court defer action on the Motion to Dismiss pending determination of *Williams v. INS*, 5th Cir. Case No. 96 6031, then pending and believed to be on all fours with the instant proceeding.

On September 17, 1996, the Court entered its Order denying the Motion to Defer Action and granting the Respondent's Motion to Dismiss for Lack of Jurisdiction. It is this Order which has precipitated the Petition before the United States Supreme Court.

EXISTENCE OF JURISDICTION BELOW

The jurisdiction of the Fifth Circuit Court of Appeals under 8 U.S.C. Sec. 1105a(a).

ARGUMENT

The decision below should be reviewed because it erroneously retroactively applies Sec. 440(a) of the Anti-terrorism and Effective Death Penalty Act of 1996, P.L. No. 104-132, 110 Stat. 1214, to divest the court of jurisdiction of a case already accepted. It is respectfully suggested this is contrary to the intent of Congress, and is in violation of the due process clause and Article III of the Constitution of the United States. This is an important Federal question that has not been, but should be, settled by this Court.

It is respectfully submitted that Section 440(a) cannot apply to pending cases, since a statute must not be given retroactive effect without clear Congressional intent to achieve that result. *Landgraf v. U.S.I. Film,* 128 L. Ed. 2d 229 (1994). AEDPA contains no such expression of retrospective intent. In addition, under the recent decisions of this Court, a statute may not be applied retroactively where doing so would totally eliminate Federal Court jurisdiction. *Hartford Casualty v. FDIC,* 21 F.3d 696 (5th Cir. 1994).

It is respectfully suggested that Section 440(a) of AEDPA violates due process in light of the long standing suggestion that deportation triggers Constitutionally recognized liberty interests and this Court's recent reiteration of the importance of "meaningful" judicial review even for an undocumented alien claiming a statutory entitlement. *Wong Wing v. United States,* 163 U.S. 228 (1896); *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950); *McNary v. Hiatian Refugee Center,* 498 U.S. 479 (1991).

Finally, it is respectfully submitted that Section 440(a) violates Article III of the United States Constitution which "serves both to protect the role of the independent judiciary within the Constitutional scheme of tripartheid government . . . and to safeguard litigants' right to have claims decided before Judges who are free from potential domination by other branches of government." *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833 (1986). Further, the holding of this Court in *INS v. Chadha,* 462 U.S. 919 (1983) appears applicable where the Court stated "the plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a Constitutionally permissible means of implementing that power." 462 U.S. at 940-41.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

TROY R. DOUGLAS
Ark Bar No. 68015
2414 S. 57th Street, Suite 101
Fort Smith, AR 72903
(501) 484-5759
Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95 60703

ANTONIO CESAR CHAMORRO-TORRES

Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

Petition for Review of an Order of the
U.S. Immigration & Naturalization Serv.

(Filed Sep. 17, 1996)

Before EMILIO M. GARZA, STEWART and DENNIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of petitioner to defer action on respondent's motion to dismiss the petition for review is DENIED

IT IS FURTHER ORDERED that the motion of respondent to dismiss the petition for review for lack of jurisdiction is GRANTED

/s/ Illegible

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60703

ANTONIO CESAR CHAMORRO-TORRES

Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

Petition for Review of an Order of the
Immigration and Naturalization Service

(Filed Nov. 30, 1995)

Before DAVIS, BARKSDALE and DEMOSS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the unopposed motion of petitioner for stay of deportation pending review is GRANTED.

MOT-17

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A36 355 460 – Houston Date: OCT 11 1985

In re: ANTONIO *CHAMORRO*-TORRES a.k.a. Antonio Cesar Chamarro [sic]

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: R. Travis Douglas, Esquire
8011 Meadow Drive
Fort Smith, Arkansas 72903

ON BEHALF OF SERVICE: Philip S. Law
General Attorney

CHARGE:

Order: Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility

In a decision dated October 31, 1994, an Immigration Judge found the respondent deportable as charged and granted his application for a waiver under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The Immigration and Naturalization Service appealed from the grant of section 212(c) relief. The appeal will be sustained.

The respondent is a 44 year-old native and citizen of Chile, who was admitted into the United States as a

lawful permanent resident on August 14, 1977, based upon his marriage to a United States citizen. The respondent and his wife have two sons and he also has two adult step-sons from his wife's prior marriages. In October of 1988, the respondent, his wife, and their family, moved to Chile. According to the respondent, he wanted to return to Chile to engage in his family owned business and to establish a better life for his family. The respondent sold everything he owned in the United States before moving back to Chile. His wife and their children stayed in Chile for approximately 7 to 9 months. He and his wife then separated and his wife and their children left Chile and returned to the United States because of cultural differences (Tr. at 66). The respondent continued to live in Chile. He ultimately returned to the United States in October of 1989. Soon thereafter, the respondent was arrested and charged with money laundering and cocaine trafficking crimes. On November 2, 1990, the respondent was convicted on a plea of guilty to money laundering and he was sentenced to serve 51 months in a federal prison.

In addition to his money laundering conviction, the respondent was convicted in 1980 in the State of Texas for disorderly conduct. In 1984, the respondent was convicted in the State of Texas for aggravated assault on a peace officer and resisting arrest.

During the deportation hearing, the respondent applied for relief under section 212(c) of the Act. That section provides, in pertinent part, that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished

domicile of 7 consecutive years, may be admitted in the discretion of the Attorney General.

In a decision dated October 31, 1994, the Immigration Judge found the respondent eligible for section 212(c) relief. She then concluded that the respondent merited section 212(c) relief as a matter of discretion.

On appeal, the Service asserts that the Immigration Judge erred in granting section 212(c) relief in view of the fact that the respondent failed to establish that he had not abandoned his lawful permanent resident status, thus rendering himself statutorily ineligible for section 212(c) relief.

We agree with the Service. We are not addressing an issue of deportability where the burden is on the Service. The respondent is applying for relief from deportation and must establish his statutorily [sic] eligibility for such relief. As part of that showing he must demonstrate an unrelinquished lawful domicile of 7 consecutive years. Thus, he bears the burden of proving that he remained domiciled in the United States over the period from October 1988 through October 1989. On the facts before us, we do not find that the respondent has met his burden. The respondent has not demonstrated that his attempts to reestablish himself in Chile did not constitute a change of domicile, thus rendering him statutorily ineligible for section 212(c) relief. He sold his home and moved his entire family to Chile for a better life and employment. The record reflects that the respondent's move to Chile was neither temporary nor casual. His move to Chile took place only after careful planning and discussions with his wife. They decided that they could probably make a

better life in Chile for themselves and for their children. They sold everything they owned before moving back to Chile. The respondent wanted to return to his family's business in Chile. During his entire residence of approximately 1 year in Chile the respondent had no actual home in the United States to which he could return. The respondent has not shown that he considered the United States to be his home when he departed in October of 1988. *See Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980).[1] Moreover, he has not responded to the Service's arguments on appeal. Under these facts, we do not find the respondent has met his burden of establishing eligibility for section 212(c) relief.

Accordingly, the Service's appeal will be sustained, the respondent's application for relief from deportation under section 212(c) will be denied, and the respondent shall be ordered deported to Chile. In this latter regard, we note that the respondent declined to designate a country of deportation and the Immigration Judge stated that deportation would be directed to Chile should that become necessary (Tr. at 8).

ORDER: The decision of the Immigration Judge is reversed.

---

[1] The Service also argues that the Immigration Judge erred in evaluating the discretionary factors in this case. In view of our finding that the respondent is ineligible for section 212(c) relief, we find it unnecessary to consider whether the Immigration Judge erred in analysis concerning whether the respondent merits section 212(c) relief as a matter of discretion.

FURTHER ORDER: The Service's appeal is sustained and the respondent's relief from deportation under section 212(c) is denied.

FURTHER ORDER: The respondent is ordered deported to Chile on the charge contained in the Order to Show Cause.

/s/ Mary Maguire Dunne
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Houston, Texas

File: A36-355-460	)	
In the Matter of:	)	
CHAMORRO, Antonio Cesar	)	IN DEPORTATION
Respondent	)	PROCEEDINGS
	)	

ON BEHALF OF RESPONDENT:

R. Travis Douglas, Esq.
8011 Meadow Drive
Fort Smith, AR 72903

ON BEHALF OF SERVICE:

Philip Law, INS
General Attorney
Houston, Texas

DECISION OF THE IMMIGRATION JUDGE

The Respondent is a native and citizens of Chile who first entered the United States on or about August 14, 1977, as an immigrant. Subsequent thereto, on November 2, 1990, he was convicted in for the offense of racketeering and money laundering, in violation of Title 18 USC Sec. 1956. The Immigration and Naturalization Service, hereinafter referred to as the Immigration Service, issued an Order to show cause on August 19, 1993, charging the Respondent with being deportable under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act, hereinafter referred to as the Act, as an alien who has been convicted violation of (or a conspiracy or attempt to violate) any law or regulations of a state . . . related to controlled substances. On January 26, 1994, all parties appeared before this

Court. Respondent admitted to the truth of the allegations in the Order to Show Cause and conceded deportability as charged.

Based on these admissions, the Court found that deportability was established by clear, convincing and unequivocal evidence. Woodby v. I.N.S., 385 U.S. 276 (1966). The Respondent requested and received permission to file for a waiver of excludability under Section 212(c) of the Act. Section 212(c) provides, in pertinent part, that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General with out regard to certain specified grounds for exclusion enumerated in Section 212(a) of the Act. The Court finds that the Respondent meets the threshold of statutory eligibility for Section 212(c) relief.

Section 212(c), however, does not provide an indiscriminate waiver for all who demonstrate statutory eligibility.

Instead, the attorney General or his delegate is required to determine whether, as a matter of discretion, an applicant warrants the relief sought. The alien bears the burden of demonstrating that his application merits favorable consideration. Matter of Marin, 16 I&N Dec. 581 (BIA 1978). The court will weigh adverse factors such as the gravity of the offense, violations of immigration laws, criminal records and bad character against favorable factors such as United States *family ties, long residence, hardship, military service, employment history, holdings in the United States, community involvement, rehabilitation*

and good character. When an individual is convicted of a serious drug offense he has the additional burden of showing that the negative factor of that conviction is outweighed by *unusual or outstanding countervailing equities*. Id.

The Respondent plead guilty to three counts of money laundering, the government dismissed counts one and two and recommended the minimum sentence as mandated by the sentencing guidelines. The United States District Court for the Southern District of Texas, based upon the motion of the United States Government took into consideration the fact that the Respondent "substantially cooperated with the DEA and . . . was the first person to plead and probably helped others." (sentencing transcript at p.2) and lessened the Respondent's sentence. The facts and circumstances leading to his arrest for this offense revealed the following scenario. The Respondent was in need of money and accepted an offer from an acquistance to participate in illegal activity to acquire funds. In addition, the Respondent was arrested eight or nine years ago as the result of a domestic matter.

The Court is mindful of Respondent's equities in this matter. He has resided in the United States for seventeen years and has attained status as a lawful Permanent Resident. The record reflects Respondent has strong family ties and has been a good husband and father (Exhibits #3 R.O.P.). He has maintained steady employment and received commendation from his employer.

The Court has considered these equities in reference to the offense committed. However, just as important, the Court has considered these equities in reference to not

only the offense but also Respondent's testimony and demeanor on the witness stand at the hearing. The Respondent's family testified in support of his application. They are a close and supportive family.

The Court believes that this Respondent merits a favorable Discretionary Relief. The Respondent possesses unusual or outstanding countervailing equities and they do outweigh his conviction.

ORDER: relief under section 212(c) of the Act is GRANTED.

Dated this 31st day of October, 1994.

/s/ Clarease Mitchell Rankin
CLAREASE MITCHELL RANKIN
Immigration Judge

Pertinent provisions of Constitutional and statutory citations pursuant to Supreme Court Rule 14.1(f).

28 U.S.C. Sec. 1254(1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . "

28 U.S.C. Sec. 2350(a)

" . . . a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari."

8 U.S.C. Sec. 1251(a)(2)(B)(I)

"Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign county relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involved possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. Sec. 1182(c)

"Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicil of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title."

8 U.S.C. 1105a(a)

"The procedure prescribed by, and all the provisions of Chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that . . . (10) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

P.L. No. 104-132, 110 Stat. 1214, Section 440(a)

"Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows: (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or

(D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(I), shall not be subject to review by any court."

U.S. Constitution, Article III

"2. (1) The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . "

U.S. Constitution, Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 95-60703

ANTONIO CESAR CHAMORRO-TORRES, **Petitioner,** **vs.** **IMMIGRATION AND NATURALIZATION SERVICE,** **Respondent.**	**Petition For Review Of Final Order Of Deportation** **Board Of Immigration Review INS Case No. A36 255 460**

PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Petitioner, through undersigned counsel, OPPOSES respondent's Motion To Dismiss this case, for the following reasons:

RESPONDENT'S POSITION

Respondent argues that Section 440(a) of the Antiterrorist and Effective Death Penalty Act of 1996 ["AEDPA"] Section 440(a) retroactively denies authority for judicial review of actions of the Board Of Immigration Appeals ["BIA"] in cases involving aliens convicted of certain enumerated crimes. Thus, it is contended that this Court

no longer has jurisdiction to review the denial of petitioner's application for waiver of deportation under Section 212(c) of the Immigration & Nationality Act ["INA"].

DISCUSSION

[a] ADEPA cannot apply to cases pending review prior to enactment of the statute since a statute must not be given retroactive effect without clear congressional intent being shown. *Landrif v. USI Film*, 128 L.Ed. 2d. 229 (1994). Further, a statute may not be applied retroactively where such application would totally eliminate federal court jurisdiction. *Hartford casualty v. FDIC*, 21 F.3d 696 (5th Cir. 1994).

[b] Application of Section 440(a) retroactively will require this Court to hold ADEPA unconstitutional on the ground that if [sic] denies petitioner's liberty without due process of law in violation of the Due Process Clause of the United States Constitution. Further, total elimination of judicial review of government agency action violates the Separation Of Power doctrine of Article III of the Constitution. The Case of *Williams v. INS*, 96-1131321 is presently pending before this court.

[c] *Williams*, 5th Cir. Case No. 96-6034, has been argued and is presently pending decision by this Court. Mr. Jose Vega, Attorney of Record in *Williams*, has furnished undersigned counsel with a copy of the Petitioner's Brief In Response to the INS's Motion To Dismiss the *Williams* case. A review of the law and arguments presented in *Williams* indicates that it is identical factually and legally with this case. In the interest of judicial economy it is suggested that the Court defer action on

Respondent's Motion To Dismiss this case until a decision is rendered in the *Williams* case.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that Court to deny Respondent's Motion To Dismiss herein and review this case on the merits and issues presented in Petitioner's Opening Brief herein.

Respectfully Submitted,

/s/ R. Travis Douglas
R. Travis Douglas
Attorney For Petitioner
2414 S. 57th Street, Suite 101
Fort Smith, AR 72903
[501] 484-5668

CERTIFICATE OF SERVICE

I hereby certify that the following documents was served on the following listed individuals and entities by United States Mail, postage prepaid, on the date shown below, to-wit:

DOCUMENTS SERVED:

Petitioner's Response in Opposition To Respondent's Motion To Dismiss.

PERSONS AND ENTITIES SERVED:

Mr. Hugh G. Mullane, Attorney, Department Of Justice, Office Of Immigration Litigation, Civil

Section, Box 878, Ben Franklin Station, Washington, D.C. 20044.

7/29/96
Date Served

/s/ R. Travis Douglas
R. Travis Douglas

U.S. Department of Justice

(Seal)
PMJ:HGM:hgm
39-74-1267

Telephone: 202-616-9095

Washington, D.C. 20530

July 18, 1996

Honorable Charles R. Fulbruge III, Clerk
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: Antonio Cesar Chamorro-Torres v. INS,
No. 95-60703; A36 255 460

Dear Mr. Fulbruge:

Pursuant to Rule 28(j), Federal Rules of Appellate Procedure, the respondent provides these citations to the following supplemental authorities.

In *Mendez-Rosas v. INS*, 1996 WL 350716 (5th Cir. Jun. 26, 1996) (copy enclosed), this Court resolved the issue of whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act applies retroactively. This issue is discussed at pages 15-17 of respondent's brief.

In *Matter of Soriano*, Interim Dec. No. 3289 (BIA Jun. 27, 1996) (copy enclosed), the Board of Immigration Appeals issued a precedent decision regarding the issue of whether Section 440(d) of the Antiterrorism and Effective Death Penalty Act applies retroactively. The Commissioner of the Immigration and Naturalization Service has referred this case for review by the Attorney General pursuant to 8 C.F.R. § 3.1(h)(iii). A copy of the referral is

enclosed. The retroactivity issue is discussed at pages 18-21 of respondent's brief.

Sincerely,

/s/ Hugh G. Mullane
HUGH G. MULLANE
Attorney
Office of Immigration Litigation
Civil Division
Department of Justice
PO Box 878, Ben Franklin Station
Washington, DC 20044

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ANTONIO CESAR CHAMORRO-TORRES,	)	
Petitioner,	)	No. 95-60703
v.	)	A36 255 460
IMMIGRATION AND NATURALIZATION SERVICE,	)	
Respondent.	)	

MOTION TO DISMISS PETITION FOR REVIEW FOR LACK OF JURISDICTION

Respondent, through its undersigned counsel, respectfully moves the Court to dismiss this petition for review, because the Court lacks jurisdiction under the recently enacted Antiterrorism and Effective Death Penalty Act ("AEDPA").

BACKGROUND

Chamorro was convicted for racketeering and money laundering in violation of 18 U.S.C. § 1956(a)(1)(A). A.R. 524. The Immigration and Naturalization Service ("INS") issued an Order to Show Cause ("OSC") against Antonio Chamorro-Torres ("Chamorro") on August 19, 1993. A.R. 522. The Order to Show Cause charged Chamorro with deportability under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1215(a)(2)(B)(i), based on Chamorro's conviction for racketeering and money laundering in violation of 18

U.S.C. § 1956(a)(1)(A). A.R. 524. Chamorro conceded deportability and sought relief from deportation pursuant to Section 212(c) of the INA. A.R. 65-67.

Petitioner filed his brief on May 14, 1996, and respondent filed its brief on June 16, 1996. No reply brief was filed by petitioner. Accordingly, this case has been fully briefed.

DISCUSSION

On April 24, 1996, President Clinton signed into law the AEDPA, which amends Section 106(a) of the INA by eliminating judicial review of any final deportation order against an alien "who is deportable by reason of having committed a criminal offense covered in Section 241(a)(2)(A)(iii), (B), (C), or (D). . . . " of the INA.

On June 26, 1996, this Court concluded that AEDPA was retroactive and therefore it lacked jurisdiction to consider the Board's denial of Section 212(c) relief. *Mendez-Rosas v. INS*, 1996 WL 350716 (5th Cir. Jun. 26, 1996). The Court wrote:

> Because § 440(a) explicitly affects jurisdiction, it speaks to the power of the court, rather than to the rights or obligations of the parties. As such, it is easily classified as jurisdictional in nature. We, therefore, presume that § 440(a)'s bar of judicial review retroactively applies in this action.

Id. at *3. Because the Court lacked judicial review over the Board's decision it dismissed the petition for review. *Id.* at *4.

Chamorro conceded that his money laundering and racketeering offense made him deportable pursuant to Section 241(a)(2)(B)(i) of the INA, 8 U.S.C. § 1251(a)(2)(B)(i). A.R. 65-67. Accordingly, as *Mendez-Rosas* makes clear, this Court no longer has jurisdiction to review the Board's decision pursuant to Section 440(a) of AEDPA. Accordingly, Chamorroe's petition for review should be dismissed for lack of jurisdiction.

CONCLUSION

For the reasons stated, the Court should dismiss this petition for review for lack of jurisdiction.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General
Civil Division

PHILEMINA MCNEILL JONES
Assistant Director

/s/ Hugh G. Mullane
HUGH G. MULLANE
Attorney
Civil Division
Office of Immigration Litigation
United States Department of Justice
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044
(202) 616-9095

Dated: July 18, 1996 Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 1996, one copy of Respondent's Motion to Dismiss for Lack of Jurisdiction was served on the petitioner by placing it in a Department of Justice mail room for same-day mailing, addressed to:

Mr. R. Travis Douglas, Esq.
2414 S. 57th Street
Suite 101
Fort Smith, AR 72903

/s/ Hugh G. Mullane
HUGH G. MULLANE
Attorney
Civil Division
Office of Immigration Litigation
United States Department of Justice
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